

## Order of the Tenancy Tribunal

Residential Tenancies Act 1986

Office of the Tenancy Tribunal

### Tenancy Tribunal at Wellington

#### Tenancy Address

	Wellington 6022
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#### Applicant

Full Name	Address
Nice Place Property Management Limited	Landlord 174 Riddiford Street, Newtown, Wellington 6021

#### Respondents

Full Name	Address
	Tenant [redacted] Wellington 6023
	Tenant [redacted] Wellington 6023

#### Order of the Tribunal

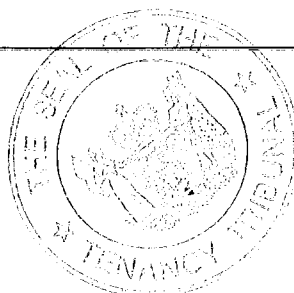
The Tribunal hereby orders:

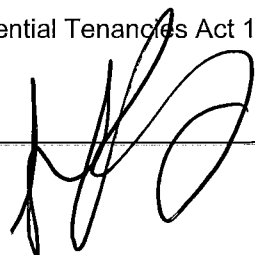
1. [redacted] and [redacted] to pay Nice Place Property Management Limited the sum of \$1,170.44 to be taken from the Bond immediately as summarised below and set out in the orders that follow this summary:

Compensation for sublease breach	\$1,000.00
Exemplary damages for unlawful sublease	\$300.00
Filing fee reimbursement	\$20.44
minus Costs to be paid to Tenant:	
Unlawful interference with postal service	-\$100.00
Reimbursement for sealing window gaps	-\$50.00
minus Bond	\$1,170.44
<b>Amount remaining payable by Tenant to Landlord</b>	<b>\$0.00</b>

(Sections 77(2)(k) and 78(1)(d) Residential Tenancies Act 1986)

Dated at Wellington on Wednesday 15-Feb-2017



  
A Bardsley, Adjudicator

2. The Bond Centre to pay the bond of \$2,280.00 (5231916-010) apportioned as follows:

Nice Place Property Management Limited	\$1,170.44
██████████ and ██████████	\$1,109.56

(Sections 22 and 127(4)(a) Residential Tenancies Act 1986)

3. ██████████ and ██████████ to pay Nice Place Property Management Limited the sum of \$20.44, being the filing fee paid on this application.

(Section 102(4)(a)(b) Residential Tenancies Act 1986)

4. ██████████ and ██████████ to pay Nice Place Property Management Limited the sum of \$1,000.00 being compensation for the loss suffered by the breach of the Tenancy Agreement and section 44 of the Residential Tenancies Act 1986

5. ██████████ and ██████████ to pay Nice Place Property Management Limited the sum of \$300.00 being exemplary damages for subleasing the premises without the prior consent of the Landlord.

(Section 44 and 109 Residential Tenancies Act 1986)

6. Nice Place Property Management Limited to pay ██████████ and ██████████ the sum of \$100.00 being compensation for for interference with the supply of postal services to premises.

(Sections 45(1) and (1A) and 109 Residential Tenancies Act 1986)

7. Nice Place Property Management Limited to pay to ██████████ and ██████████ the sum of \$50.00 as reimbursement for sealing window gaps.

(Sections 45(1)(d) Residential Tenancies Act 1986)

8. The Bond Centre to pay the bond of \$2,280.00 (5231916-010) apportioned as follows:

Nice Place Property Management Limited	\$1,170.44
██████████ and ██████████	\$1,109.56

(Sections 22 and 127(4)(a) Residential Tenancies Act 1986)

**Introduction:**

1. The Landlord sought compensation and exemplary damages for the tenant's breach of the tenancy agreement by subletting when expressly prohibited, and compensation for internet use, damages & door key & lock change.
2. At the hearing the Landlord withdrew its claim for compensation for internet use and damages.
3. The Tenants claim is that the Landlord interfered with the supply of telephone, internet, TV and postal services by disconnecting with no notice or agreement. They also claim that the Landlord did not repair certain window gaps and they had to seal the gaps themselves.

4. The Tenants seeks a refund of bond, and compensation and exemplary damages for the Landlords failure to supply receipt for bond, interference with supply of certain services and for failure to repair window in a timely fashion.

### Facts

5. The tenancy was a fixed term tenancy for approximately 4 month (23/4/16 to 26/8/16). The Landlord was renting out the house fully furnished on behalf of the owners, who usually reside in the Property but were travelling (the Owners). The Tenants are from the United Kingdom and had recently migrated to New Zealand.
6. During the tenancy the Tenants purchased their own property, with settlement being 23 July 16, so requested to end their tenancy a month early but the request was not agreed to. As they both rent for the Property and the new house mortgage to pay from its settlement date the Tenants signed up with Airbnb to host guests at the Property to cover their last month's rent payment. *Airbnb* is an online marketplace where guests go to find a bed to stay and hosts list their room/property for rent. The Tenants hosted approximately 7 different groups at the Property during the tenancy and accordingly were paid a total of \$1,568.00 through Airbnb. The guests had sole and exclusive use of the Property during their stay.
7. When the tenants moved in, they had access to and used the Owners electricity, telephone, internet and TV service. At some stage the phone, internet and TV service was cut off. The Tenants also received no post for some months, and discovered the reason for no post is that the Owner had completed a "Hold All" while they were away.
8. The key issue revolves around the subleasing claim, so I will address this first. The questions to be decided are: Were the Tenants subleasing the Property? If so, was it a breach of the Act or the Tenancy Agreement? If so, what loss has the Landlord suffered? Based on this assessment, what compensation should be payable? And should exemplary damages be awarded.

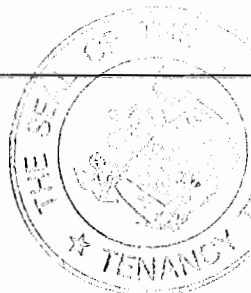
### Decision

#### Were the Tenants subleasing the Property?

9. I am satisfied that the Tenants hosting Airbnb guests in the Property ("the Arrangement") was subleasing for the following reasons:
10. Whilst the Residential Tenancy Act 1986 ("the Act") does not define "subletting", case law, common use and dictionary usage of "subletting" is consistent in defining it as a situation where a tenant accommodates others in a property in return for rent in some form, whilst still retaining responsibility for the tenanted property:
11. Black's Law dictionary by Garner, Bryan A, 99<sup>th</sup> edition, defines sublease as a "lease by a lessee to a third party, conveying some or all of the leased property for a shorter than or equal period to that of the lease, who retains the rights & responsibilities of the lease..."
12. Tenancy Tribunal decisions reinforce that a sublessor is where a tenant continues to pay rent to the landlord and remains liable under the tenancy agreement (see *Wilkie v Stevens DC May 1993, at p3.*)

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Dated at Wellington on Wednesday 15-Feb-2017



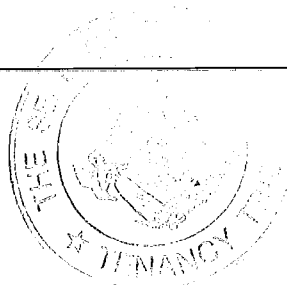
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A Bardsley, Adjudicator

13. There is online debate about whether a tenant renting out only one room of their rental property on Airbnb is "subleasing" versus a clear online consensus that renting out the whole property is subleasing. As to whether "hosting" one room is subleasing is not a question I need to answer in this decision as this matter concerns the guest having exclusive and sole use of the whole property.
14. Looking at law, common use and dictionary use I find that the Arrangement was "subletting" as the Tenants:
  1. Accommodated people in the Property they were renting, and
  2. Received consideration by way of rent for the accommodation arrangement; and
  3. Their "guests" had exclusive use of the Property; and
  4. Were still liable under the Tenancy Agreement while those guests were staying at the Property.
15. Was the subleasing a breach of the Act and/ or the Tenancy Agreement?
16. I am satisfied that the subleasing Arrangement was a clear breach of both the Act and the Tenancy Agreement.
17. Whilst both the Act (section 44) and the Tenancy Agreement (clause 8) provide that a tenant *may* sublet and assign a Property *unless* expressly prohibited it is clear that in this situation subleasing was expressly prohibited. The Tenancy Agreement specifically provides that "*The tenant shall not assign or sublet the tenancy without the landlord's written consent*".

What loss has the Landlord and Owner suffered?

18. The Landlord and Owner suffered loss in several ways. The key loss submitted to the Tribunal was the mental distress that resulted from the breach.
19. The Owners of the Property provided the Tribunal with an impact statement. The statement specifies the alarm, surprise, confusion and subsequent anger when they discovered the Arrangement. They were anxious about the potential mistreatment of their home by parties unknown to them and they decided to cut their holiday short, they were also particularly anxious as "*we knew that letting an entire house on Airbnb is a different insurance policy (a business policy), so our house and contents were not insured because of the tenant's action*". They wanted to end the tenancy as soon as the last Airbnb guest left, Wednesday 17 August. The Owner does say she was relieved when inspecting the Property on 18 August that the Property had been left in good shape and was basically clean. They also discovered some damage and were "quite over-wrought" when they moved back and were worried about security".
20. The Owner ends their impact statement with "it was absolutely heart-breaking to think that people could be so uncaring and disrespectful of us and our things. It took me 10 days to get our home back as it was when we left it and..I am still upset and distressed by the whole affair".
21. I am satisfied that the Landlords and Owners suffered mental distress.
22. It was also submitted that the Owners shorted their trip when they discovered the Arrangement.



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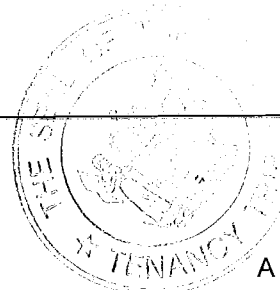
23. On discovering the subleasing Arrangement, the Landlord agreed to end the tenancy 9 days earlier than the fixed term. It has not specifically applied for the loss of this 9 days rental, no doubt because the Owners were very keen to have the tenants out of the Property. However, but for the subleasing Arrangement, the Landlord would have received rent up to and including 26 August 2017, which would have been an additional \$732.85 rent.

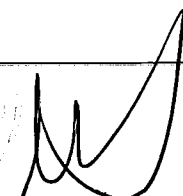
What compensation should be payable?

24. I am satisfied that the Landlord is entitled to \$1,000.00 in compensation for the subleasing. This is so for the following reasons:
25. The loss suffered by the Landlord and Owner is largely mental distress, an intangible loss, which is difficult to value but is a real loss. It is also difficult to place a value of the owner's trip being shortened by the Arrangement. There is also the rent loss caused by tenancy ending 9 days early.
26. The Landlord submits compensation should be the value of rent received by the tenants from Airbnb, \$1,568.00. Whilst I understand this submission, I have not used this figure in my calculation of compensation, rather I have focussed on the impact of the breach.
27. I have taken into consideration the amount of mental distress caused, particularly to the Owners as set out in their impact statement, whilst also taking into consideration that the tenants ceased the breach as soon as requested and that there was no lasting physical damage to the Property caused by the breach.
28. Whilst it is not easy to strike a figure for compensation, especially with the loss being largely the Owners mental distress, there is in general a band within which there is a fair objective measure.
29. In a breach that is at the lower end of the scale, there may be nothing lost in monetary terms, but the party may still have had to put up with the inconvenience, annoyance, frustration or disappointment that comes with such a breach. Awards in such cases have tended to be \$100.00-\$450.00.
30. In a breach that intrudes further into the party's life, the party may have endured a greater degree of inconvenience, and the mental distress will have probably increased to worry, stress, tension or anxiety. Awards in such cases have tended to be \$450.00-\$1,000.00.
31. In a major breach that heads towards the highest end of the scale, the party may have experienced all or some of hardship, insecurity, humiliation, intimidation, aggravation and fear. Awards in such cases have tended to be \$1,000-\$2,000.00.
32. So when considering the impact on the Landlord and Owners and how previous cases have priced that type of impact I award the Landlord \$1,000.00 as it sits between a mid range and high end breach.

Should exemplary damages be awarded?

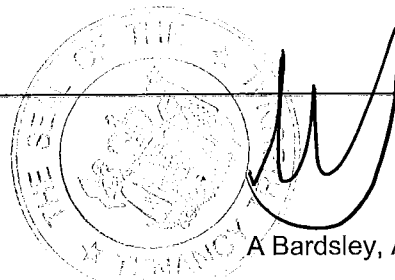
33. In tenancy issues exemplary damages are available for unlawful acts and if applied for. Section 44 (2A) of the Act provides that subleasing is an unlawful act when it is expressly prohibited, therefore exemplary damages are available in this matter and the Landlord has applied for it.



  
A Bardsley, Adjudicator

34. I note that the Landlord seeks exemplary damages for the stress and worry caused by the Arrangement. As I advised the parties during the hearing, exemplary damages are not designed to compensate for the loss and stress suffered, that is the purpose of compensation. Exemplary damages are intended to reform or deter the respondent and others from engaging in conduct similar to the breach.
35. Exemplary damages are awarded where the Tribunal is satisfied that the party committed the unlawful act intentionally, and that, having regard to their intent, the effect of the unlawful act, the interests of the landlord, and the public interest, it would be just to require that party to pay a sum in the nature of exemplary damages. These elements are set out in section 109(3) of the Act.
36. I am satisfied that it is just to award \$300.00 in exemplary damages for the breach. This is so for the following reasons:
37. I accept the tenant's submission that they genuinely did not consider the Arrangement subletting or intend to breach the tenancy agreement. I also accept that they were careful in vetting potential guests and that they endeavoured to ensure the guests treated the Property respectfully. During the hearing they repeatedly apologised to both the Landlord and the owner for the breach and showed genuine remorse. Further, as soon as the Landlord advised the tenant that the Arrangement was a breach, they ceased the activity.
38. However, whilst they were not aware they were "subletting", the Tenants did deliberately and intentionally host "guests" and the Tenancy did expressly prohibit subleasing. They had already requested from the Landlord an early end to the fixed term, and in not being able to end the lease early they carefully planned how they could obtain remuneration for that last month of the tenancy. Subletting the Property was not the only option available to them but that is the option they chose to take.
39. A simple Google search of "*subletting through Airbnb*" gives the reader consistent information that short term rentals should not be hosted by a tenant without the permission of their landlord [1]. The Tenants listed the Property on Airbnb with no consultation with the Landlord. As the Property contained all the Owners personal possessions it would be reasonable to assume Hosting on Airbnb would not be an activity the Landlord would approve of.
40. That the Tenants, as new migrants to New Zealand, were not aware the hosting was subleasing, does not alleviate that they intentionally carried it out. The Tenants did intentionally commit the unlawful act and I am satisfied that exemplary damages should be awarded.
41. With the rise in New Zealand of people using online community market places to rent out their homes for short term stays I find it necessary to award exemplary damages to show disapproval for such behaviour and to deter other tenants from subleasing when expressly prohibited.
42. Schedule 1A of the Act provides that up to \$1,000 as can be awarded for such an unlawful act. \$1,000 would be awarded for the most outrageous of breaches.
43. In having regard to the genuine remorse shown and apology given by the Tenants, and that there is no evidence of previous offending history from the tenants, and that they are very unlikely to repeat such a breach, I award exemplary damages of \$300.00, that being at the

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lower end of the scale.

**Other costs:**

44. I am satisfied that the Landlord should be reimbursed for the keys cut costs of \$59.69. The Airbnb guests were not screened by the Landlord or Owners and the Owners understandably felt their security had been compromised. To provide comfort to the owners that the premises were reasonably secure it was necessary for the Landlord to get new key and lock and I find the tenant liable for this cost.

**Tenant's claims**

45. I am satisfied that the Tenants are entitled to \$100.00 compensation for the Owners interference with the supply of postal services to the Property and \$50.00 for the material and time in sealing window gaps. I dismiss the Tenants other claims.
46. Whilst I accept the Tenant's claims that having the phone, internet and TV service disconnected during the tenancy was inconvenient and a nuisance, they have provided insufficient evidence to show that there was an obligation on the landlord to provide these services to them. Further, I accept the Landlord's evidence that it provided the Tenants sufficient notice of such disconnections.
47. A landlord is not permitted to interfere with the supply of services to premises except where the interference is necessary to avoid danger to any person or to enable maintenance or repairs to be carried out. The landlord breached that duty as there was no postal service to the Property for a period of time during the tenancy as the Owner incorrectly requested NZ Post to "Hold All" mail rather than a specific redirection. This caused the tenants inconvenience and frustration.
48. The issue of no Post was resolved around 10<sup>th</sup> July 2016, so this means the Tenants were without the service for about 6 weeks. Such a loss is hard to value as it is intangible (and if there was a tangible loss, the Tenants provided no evidence of this). As I directed to the Parties during the hearing, I do not consider the Owners actions in wrongly advising NZ Post should attract exemplary damages as it was an innocent mistake. I consider \$100.00 sufficient compensation considering the minimal impact it had on the Tenants.
49. The Tenants also claimed they had received no receipt for their bond lodgement. However, I accept the Landlords evidence provided during the hearing that an automatic email confirmation would have been sent to the tenants, therefore I have dismissed this claim.

**Bond**

50. The amount awarded to the Landlord, minus the \$150.00 awarded to the Tenant, will be paid to the Landlord from the Bond, with the remaining bond to be refunded to the tenant.

**Filing fee**

51. If a party has been partly successful in their claim I may order that the other party pay the filing fee the Applicant paid to file their application. The Landlord has been largely successful in its

claim so I award it the filing fee.

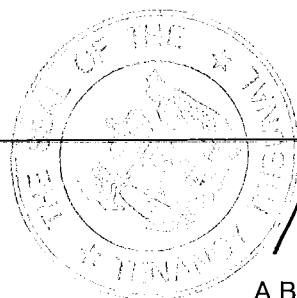
**Conclusion:**

52. An order has been made for the Tenants to pay \$1,000.00 in compensation and \$300.00 in exemplary damages to the Landlord for the subletting; and
53. An order has been made against the Tenants for the \$59.69 key cut costs and \$20.44 filing fee.
54. An order has been made for the Landlord to pay the tenants \$150.00 for compensation for interference with their postal service and reimbursement for sealing window gaps.

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[1] See

<https://community.airbnb.com/t5/Travelers/Host-is-subletting-without-landlord-s-permission-will-i-the/td-p/196171> and  
<http://www.nolo.com/legal-encyclopedia/tenants-how-make-airbnb-work-you-your-landlord.html>



A handwritten signature in black ink, appearing to be "A Bardsley", written over a horizontal line.

Dated at Wellington on Wednesday 15-Feb-2017

A Bardsley, Adjudicator





*Please read carefully:*

**SHOULD YOU REQUIRE ANY HELP OR INFORMATION REGARDING THIS MATTER PLEASE CONTACT YOUR LOCAL "TENANCY SERVICES" OFFICE.**

**MEHEMEA HE PATAI TAU E PA ANA KI TENEI TAKE, PATAI ATU KI TE TARI "TENANCY SERVICES".**

**AFAI E TE MANA'OMIA SE FESOASOANI E UIGA I LENEI MATAUPU, FA'AMOLEMOLE IA FA'AFESO'OTA'I LOA LE OFISA O LE "TENANCY SERVICES".**

#### **Rehearings:**

You may make an application to the Tenancy Tribunal for a rehearing. Such an application must be made within five working days of the order and must be lodged at the Court where the dispute was heard.

The **only** ground for a rehearing of an application is that a substantial wrong or miscarriage of justice has or may have occurred or is likely to occur. **Please note that being unhappy or dissatisfied with the decision is not a ground for a rehearing (see "Right of Appeal" below).**

#### **Right of Appeal:**

If you are dissatisfied with the decision of the Tenancy Tribunal, you may appeal to the District Court. A filing fee of \$200.00 applies. You only have 10 working days to lodge a notice of appeal.

**However**, you may **not** appeal to the District Court:

1. Against an interim order made by the Tribunal.
2. Against an order, or the failure to make an order, for the payment of money where the amount that would be in dispute on appeal is less than \$1,000;
3. Against a work order, or the failure to make a work order, where the value of the work that would be in dispute on appeal is less than \$1,000.

#### **Enforcement:**

Where the Tribunal made any order and it needs to be enforced then the party seeking enforcement should apply to the Collections Office of the District Court.

#### **Notice to a party ordered to pay money or vacate premises etc.:**

Failure to comply with any order may result in substantial additional costs for enforcement. It may also involve being ordered to appear in the District Court for an examination of your means or seizure of your property.